Supreme Court, U.S.
FILED
MAR 24 2010
OFFICE OF THE CLERK

No. 09-980

IN THE

Supreme Court of the United States

BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED,
Petitioner,

—v.—

UNITED STATES OF AMERICA et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE INTERNATIONAL CHAMBER OF COMMERCE UNITED KINGDOM AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

GARY W. KUBEK
CARL MICARELLI
Counsel of Record
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022
(212) 909-6000
cmicarelli@debevoise.com
Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE D.C. CIRCUIT'S APPLICATION OF THE "EFFECTS TEST" IS INCONSISTENT WITH THIS COURT'S HOLDINGS THAT U.S. STATUTES SHOULD BE CONSTRUED TO TAKE ACCOUNT OF FOREIGN SOVEREIGNTY 5

II. THE "EFFECTS TEST" CAUSES NEEDLESS FRICTION WITH FRIENDLY FOREIGN NATIONS ... 8

III. THE "EFFECTS TEST" IS INCONSISTENT WITH U.S. FOREIGN POLICY AND MODERN STATE PRACTICE 11

A. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 11

B. The UN Convention Against Transnational Organized Crime 13

IV. THE "EFFECTS TEST" CAUSES NEEDLESS UNCERTAINTY FOR BUSINESSES AROUND THE WORLD 15

CONCLUSION 16

TABLE OF AUTHORITIES

Cases

F. Hoffmann-LaRoche Ltd. v. Empagran S.A., 542 U.S. 155 (2004) 6, 7, 13

Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984) 5

United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) 9

Statutes

Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 *et seq.* 11, 12

Foreign Extraterritorial Measures Act, R.S. 1985, c. F-29 (Canada) 10

Foreign Proceedings (Excess of Jurisdiction) Act 1984, Act No. 3 of 1984 (Australia) 10

Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a 6

Law No. 80-538, 1980 J.O. 1799 (France) 10

Protection of Trading Interests Act 1980 (c. 11) (U.K.) 8, 10

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* .....*passim*

Treaties

OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Senate Treaty Doc. 105-43, KAV 5210 (signed Dec. 17, 1997, ratified by U.S. Dec. 8, 1998, entered into force for U.S. Feb. 15, 1999)... 11, 12, 13

United Nations Convention Against Transnational Organized Crime, Senate Treaty Doc. 108-16, KAV 6399 (signed Nov. 13, 2000, ratified by U.S. Nov. 4, 2005, entered into force for U.S. Dec. 3, 2005)..... 11, 13, 14

Other Authorities

James R. Atwood & Kingman Brewster, ANTITRUST AND AMERICAN BUSINESS ABROAD (2d ed. 1981) 8

House of Commons Debate on the Protection of Trading Interests Bill, statement of the Secretary of State for Trade, Hansard, HC Deb 15 Nov. 1979, Vol. 973, cc 1533-1591..... 8, 9, 10

International Chamber of Commerce, *Policy Statement on Extraterritoriality and Business* (July 13, 2006) 2

Organisation for Economic Cooperation and Development, *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (adopted by Negotiating Conference Nov. 21, 1997)..... 12

INTEREST OF THE *AMICUS CURIAE*

The International Chamber of Commerce United Kingdom ("ICC United Kingdom") respectfully submits this brief as *amicus curiae* in support of granting the petition, which raises issues in which ICC United Kingdom and its members have a vital interest. All parties have been given the required notice and have consented in writing to the filing of this brief, as evidenced by consents on file with the Clerk of this Court.[1]

ICC United Kingdom is the British National Committee of the International Chamber of Commerce ("ICC"), the largest and most representative business organization in the world. ICC United Kingdom works to promote and facilitate international trade and investment as a force for economic growth, job creation and prosperity.

Among other functions, ICC promotes voluntary rules governing the conduct of business across borders, which rules are observed in countless thousands of transactions every day; it provides essential trade-related services such as the ICC International Court of Arbitration, the world's leading arbitral institution; and it provides a business voice on key issues related to international trade and investment in key intergovernmental fora such as the United

---

[1] No portion of this brief was authored by counsel for any party, and no person or entity other than *amicus curiae* and its counsel made any monetary contribution to fund the preparation or submission of this brief.

Nations, the World Trade Organization and the G-20.

As an ICC national chapter, ICC United Kingdom works to provide the views of U.K. members in the development of ICC's policy positions and rules, as well as representing the interests of international business to U.K. policymakers and regulators. ICC United Kingdom's policy positions are based on the consensus views of its cross-sectoral membership, which includes major international companies across financial services, manufacturing, pharmaceuticals, and energy, as well as many small companies, law firms, and trade associations.

ICC has been concerned for many years about the adverse effect on international trade and investment of extraterritorial application of national laws. It constituted a Task Force on Extraterritoriality and issued the ICC *Policy Statement on Extraterritoriality and Business* on July 13, 2006.

In the present case, the Court of Appeals held that the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* ("RICO"), applied to the petitioner's foreign conduct, giving RICO exterritorial application, which may infringe on other States' legitimate interests and have an adverse impact on international business. The circumstances in which RICO and other U.S. statutes may be given extraterritorial application presents a critically important issue for the members of ICC United Kingdom, as well as other non-U.S. business entities.

SUMMARY OF ARGUMENT

The petition presents an important question of whether the extraterritorial application of RICO to the foreign conduct of petitioner and other similarly situated foreign persons based on tenuous "effects" in the United States, as envisaged by the Court of Appeals for the District of Columbia Circuit, may infringe on other nations' sovereignty. Under recognized principles of comity and this Court's precedents, acts of Congress should be construed on the assumption that Congress intended to respect the legitimate sovereign interests of other states. The decision below, however, treats other states' interests in regulating conduct within their borders as irrelevant.

Remarkably, the D.C. Circuit's decision states that application of U.S. law to foreign conduct under the "effects test" does not even raise an issue of the presumption against extraterritorial application of statutes. That holding ignores not only developments in the law in this Court and in other circuits, but also the strong reaction of the U.K. and other nations, which have regarded U.S. courts' adoption and application of the "effects test" as an invasion of their sovereign interests and have adopted blocking measures intended to protect their own nationals against its application.

The United States, too, has recognized that law-enforcement problems transcending national boundaries are better approached through cooperation than through the automatic extension of U.S. law to foreign conduct. For example, the United States has

recently subscribed to two treaties that endorse a cooperative approach among nations in combating corruption and organized crime. These treaties recognize the importance of having each state take responsibility for conduct within its own legitimate regulatory sphere.

The resolution of the proper extraterritorial reach, if any, of RICO is important not just for cooperation among nations but also for the legitimate interests of international business. Given the unpredictable application of the "effects test" and the split among circuits on its application, companies throughout the world have no clear answer about the extent to which their entirely foreign conduct may be deemed to subject them to treble damages liability in the United States. American companies, as well, may find themselves subject to regulation by foreign states for their purely domestic conduct, in the event that a broad "effects test" is emulated abroad. As a matter of fundamental fairness, as well as respect for the sovereignty of other nations, businesses should be able to discern what laws apply to them and not be arbitrarily subjected to overlapping and possibly inconsistent legal regimes.

ARGUMENT

I.

THE D.C. CIRCUIT'S APPLICATION OF THE "EFFECTS TEST" IS INCONSISTENT WITH THIS COURT'S HOLDINGS THAT U.S. STATUTES SHOULD BE CONSTRUED TO TAKE ACCOUNT OF FOREIGN SOVEREIGNTY

This Court has long recognized that, absent a clear expression of contrary intent, acts of Congress are assumed to apply in the United States only. In the decision below, however, the Court of Appeals for the District of Columbia Circuit held that "when a statute is applied to conduct meeting the effects test, the presumption against extraterritoriality does not apply." App. 58a. According to the Court of Appeals, conduct meets the "effects test," and applying U.S. law to it is therefore "'*not* an *extraterritorial* assertion of jurisdiction,'" if the conduct has "substantial domestic effects." *Id.* (quoting *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 923 (D.C. Cir. 1984)) (emphasis in original).

The Court of Appeals did not limit the term "substantial domestic effects" to actions occurring in or directed at a person or property in the United States. Rather, in affirming the District Court's judgment against petitioner British American Tobacco (Investments) Limited ("BATCo"), the Court of Appeals applied U.S. law to BATCo based solely on its (1) participation in international industry organizations, some of whose members were U.S. companies, and (2) sharing of research information with a U.S. affiliate. App. 59a-60a. The court made no finding that

BATCo itself sold or marketed products in the U.S., that it misled or intended to mislead U.S. consumers, or that it caused, intended or even expected its U.S. affiliate to use the results of its research in any particular way. *Id.*

Under any reasonable view of comity among sovereign nations, the alleged conduct of BATCo in the United Kingdom, aimed at promoting its sale of cigarettes in the United Kingdom, should be regarded as a potential concern exclusively of the U.K. Government, not the U.S. Government. As demonstrated in the petition, the Court of Appeals' broad application of RICO in this case is inconsistent with decisions of the Courts of Appeals in other Circuits. The decision below also disregards this Court's admonition that statutes should be construed with due regard for the authority of other sovereign nations to regulate conduct within their borders.

In particular, in *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), this Court reversed a decision of the Court of Appeals for the District of Columbia Circuit with respect to the extraterritorial application of the U.S. antitrust laws. *Amicus*'s parent organization, ICC, filed a brief in that case and welcomed the Court's clarification of that issue. In *Empagran*, the Court applied the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a ("FTAIA"), which Congress enacted to rein in the application by the lower courts of the "effects test" in the antitrust context. The Court held that the FTAIA barred application of the antitrust laws to foreign conduct affecting competition in foreign markets, even if it was part of an alleged global

price-fixing scheme involving the U.S. as well. In so holding, this Court did not rely simply on the history of the FTAIA, but reaffirmed the principle that ambiguous statutes should be construed so as "to avoid unreasonable interference with the sovereign authority of other nations." *Id.* at 164. The Court explained, "This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws." *Id.*

In the present case, the Court of Appeals disregarded that principle. Rather than follow or even cite this Court's decision in *Empagran*, the Court of Appeals drew on its own older precedent in the antitrust context, and simply assumed without any consideration that Congress intended to disregard the legitimate interests of other governments in regulating conduct within their own sovereign territory based on a mere showing of any U.S. effects of the foreign conduct. The difficulties with this approach have been well-stated by an academic commentator:

> The effects test was debatable enough under international law, but the problem was seriously exacerbated when jurisdiction was asserted under that theory without consideration for the consequences for other nations. Under recognized principles of comity, states were obliged to consider and weigh the legitimate interests of other states when taking action that could affect those interests, and were supposed to

> leave the regulation of conduct to the state with the primary interest.

1 James R. Atwood & Kingman Brewster, ANTITRUST AND AMERICAN BUSINESS ABROAD 158 (2d ed. 1981). *Amicus* submits that the Court of Appeals for the District of Columbia Circuit failed in its analysis to give due consideration to the international ramifications of its decision.

II.
THE "EFFECTS TEST" CAUSES NEEDLESS FRICTION WITH FRIENDLY FOREIGN NATIONS

The D.C. Circuit's statement that application of U.S. law under the "effects test" is not extraterritorial application at all is belied by the reaction of other nations to the application of the "effects test" in past cases. Broad claims to extraterritorial jurisdiction, especially as asserted by U.S. courts under the "effects" test, have caused widespread international concern and at times have provoked blocking or retaliatory measures.

These concerns are exemplified by a speech given by the British Secretary of State for Trade during debate in the House of Commons on the Protection of Trading Interests Bill. *See* House of Commons Debate on the Protection of Trading Interests Bill, statement of the Secretary of State for Trade, Hansard, HC Deb 15 November 1979, Vol. 973, cc 1533-1591 ("Hansard, Vol. 973"). The bill was ultimately enacted as the Protection of Trading Interests Act 1980, which, among other things, authorizes the U.K. Government to forbid persons in the U.K. from

complying with extraterritorial measures affecting U.K. trade interests and seeks to counteract the enforcement of judgments for treble or multiple damages, such as arise under the U.S. antitrust laws or RICO. *See* Protection of Trading Interests Act 1980 (c. 11), §§ 1-3, 6-7 (U.K.).

In his speech, the U.K. Secretary of State for Trade made clear that this legislation was motivated largely by efforts to apply U.S. laws extraterritorially to U.K. businesses, including in no small part the "effects test" adopted by some U.S. courts. Referring, in part, to *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), which first adopted the "effects test" in the antitrust context, the Secretary of State said:

> The wide extent and fundamental uncertainty of this claimed reach of United States law through this pernicious extraterritorial effects doctrine has created uncertainty for international industry in this country and elsewhere. The views which I express on this subject are not held just by our Government, they are held and deeply felt in Canada, Australia, South Africa and other countries.

Hansard, Vol. 973, at cc 1535. The Secretary of State made clear that he was expressing the considered view of the British Government in this regard, referring to "practices in which successive United Kingdom governments have taken exception," *id.*, and stating "[w]e are engaged in a delicate and complicated legal matter. I have written down my words

and am choosing them with great care," *id.* at cc 1538.

In the same speech, the U.K. Secretary of State for Trade described the approach favored by the United Kingdom:

> [T]he increasing volume of international trade, the swiftness of modern communications, the international nature of many enterprises and increasing specialization on the part of industrial nations means that, while trading nations are interdependent in a real sense, their economic and commercial policies are bound sometimes to come into conflict. We recognize this, and we believe that the right way to sort out the resulting differences of policy and approach is by intergovernmental discussion and negotiation through established international organizations.

Hansard, Vol. 973, at cc 1534.

The Protection of Trading Interests Act 1980 was enacted with the agreement of all the political parties in Parliament. Similar statutes have been brought into effect in many other countries. *See, e.g.*, Foreign Extraterritorial Measures Act, R.S. 1985, c. F-29 (Canada); Foreign Proceedings (Excess of Jurisdiction) Act 1984, Act No. 3 of 1984 (Australia); Law No. 80-538, 1980 J.O. 1799 (France). The enactment of these statutes demonstrates the widespread international opposition to the extraterritorial application of U.S. law through the use of the effects test.

III.
THE "EFFECTS TEST" IS INCONSISTENT WITH U.S. FOREIGN POLICY AND MODERN STATE PRACTICE

In recent years, the United States has increasingly followed an international consultative approach in dealing with global problems in the fields of crime and corruption, not the unilateral extension of U.S. law based on tenuous "effects" in the United States. This is exemplified and established by two recent multilateral conventions successfully pursued by the State Department: the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Senate Treaty Doc. 105-43, KAV 5210 (signed Dec. 17, 1997, ratified by U.S. Dec. 8, 1998, entered into force for U.S. Feb. 15, 1999) (the "OECD Bribery Convention"); and the United Nations Convention Against Transnational Organized Crime, Senate Treaty Doc. 108-16, KAV 6399 (signed Nov. 13, 2000, ratified by U.S. Nov. 4, 2005, entered into force for U.S. Dec. 3, 2005) (the "UN Organized Crime Convention").

A. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

The OECD Bribery Convention has its roots in the 1979 enactment of the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 *et seq.* ("FCPA"), by the U.S. Congress. The FCPA, which was enacted in response to strong concern about certain corrupt international business practices, has had a wide and salutary effect. All American companies, foreign multinational companies that have listed their securities on U.S.

exchanges, and all companies with respect to their actions within the U.S. are subject to its jurisdiction and are required to comply with its provisions.

Following the enactment of the FCPA, however, the argument was made that American businesses were at a disadvantage in international operations in relation to foreign competitors who had not subjected themselves to U.S. jurisdiction. But rather than seek to expand the reach of the FCPA to support prosecution of foreign businesses based on supposed "effects" in the United States, the U.S. Government took a more sensitive, and ultimately more effective, approach. The United States initiated negotiations in the Organisation for Economic Co-operation and Development ("OECD") for a multilateral treaty requiring adhering states to adopt, as part of their own law, measures comparable to the FCPA. The negotiations were successful, and in 1997 the Bribery Convention was adopted by OECD members. The *amicus*'s parent organization, ICC, nominated an expert who was one of the advisors to the OECD Working Group that formulated the OECD Bribery Convention.

The OECD Bribery Convention "seeks to assure a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials without requiring uniformity or changes in fundamental principles of a Party's legal system." *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* ¶ 2 (adopted by Negotiating Conference Nov. 21, 1997). The Convention is clear that jurisdiction is to be territorial or over the nationals of

a state. OECD Bribery Convention § 4. There is no purported extraterritorial jurisdiction over non-nationals. *Id.* § 4(1), (4). The Convention makes provision for consultation when more than one party has jurisdiction and for mutual legal assistance. *Id.* § 9. Thus, the U.S. obtained substantially the same, if not greater, legal reach for anti-bribery measures as an extraterritorial "effects test" application of the FCPA, but it did so by consent, with the active and willing participation of foreign states and with full respect for the "sovereign authority of other nations." *Empagran*, 542 U.S. at 164.

B. The UN Convention Against Transnational Organized Crime

The United States followed a similar approach in pursuing the UN Organized Crime Convention, the purpose of which is "to promote cooperation to prevent and combat transnational organized crime more effectively." UN Organized Crime Convention § 1. Following ratification, the UN Convention became binding on the United States on December 3, 2005.

The subject matter and structure of the UN Organized Crime Convention have significant parallels with RICO. It has similar predicate offences ("serious crime," defined to include conduct punishable by at least four years imprisonment with specific inclusions of money laundering, corruption and obstruction of justice). UN Organized Crime Convention §§ 6, 8, 23. There is the same key element of participation in an organized criminal group. *Id.* § 5. Legal persons such as companies are also covered by the UN Convention. *Id.* § 10.

As interpreted by the court below, however, RICO extends far beyond what the UN Organized Crime Convention contemplates. The UN Organized Crime Convention's provisions on jurisdiction are carefully worded and are contained in Articles 4 and 15. Article 4 contains a strong statement of the principle of sovereign equality: "Nothing in this Convention entitles a State party to undertake in the territory of another State the exercise of jurisdiction and performance of the functions that are reserved exclusively for the authorities of that other State by its domestic law." *Id.* § 4(2). This principle is further supported by the statement that jurisdiction is to be territorial. *Id.* § 15(1). There is an exception to this rule, in that the Convention permits a country to assert jurisdiction over an offence committed against its own national or outside its territory with a view to commission of a serious crime within the territory or to launder the proceeds of crime within the territory. *Id.* § 15(2). This principle, however, is subject to the principle of respect for other states' sovereignty within their territory set forth in § 4. *Id.* § 15(2). Further, the Convention permits a state to exercise criminal jurisdiction "in accordance with its domestic law," but provides that this exercise is "[w]ithout prejudice to norms of general international law." *Id.* § 15(6).

IV.
THE "EFFECTS TEST" CAUSES NEEDLESS UNCERTAINTY FOR BUSINESSES AROUND THE WORLD.

Lastly, the decision below creates unnecessary uncertainty for members of ICC United Kingdom and countless other foreign persons as to whether they may be subject to liability for treble damages under RICO based on allegations that their purely foreign conduct had some minimal, indirect effect in the United States. Because RICO has been so broadly interpreted, and because the "effects test" is vague and unpredictable in its application, the conflict in application of that statute in different circuits provides no clear answer for companies throughout the world about the extent to which their entirely foreign conduct may be deemed to subject them to treble damages liability in the United States.

Moreover, actions taken by an important trading nation like the U.S. can influence the behavior of other nations, not only by provoking retaliation or blocking but also by serving as a model for others. In recent years, the European Union and other foreign regulators have become more aggressive in enforcing their antitrust laws and other business laws. If ill-considered decisions by U.S. courts are allowed to blur the accepted limits of national regulatory powers, U.S. companies could one day find themselves subject to enforcement actions by foreign countries based on their wholly U.S. actions having an alleged "effect" overseas. To be able to compete fairly, businesses, whether in the U.S., the U.K. or another country, are entitled to know the rules that apply to

them and should not be unnecessarily subjected to overlapping and possibly conflicting sets of laws.

CONCLUSION

In sum, actions by Congress, this Court, the U.S. Government and friendly foreign nations over the last 25 years all point toward a cooperative approach to legal problems arising from international trade. The opinion below, however, is a throwback to earlier doctrine, which views the world as if the United States were the only regulator. That approach fails to take account of the interests of comity to foreign nations and the legitimate expectations of companies doing business internationally. For these reasons, *amicus* submits that the Court should grant the petition to resolve the important questions presented and put an end to any uncertainty.

Respectfully submitted,

GARY W. KUBEK
CARL MICARELLI
Counsel of Record
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, NY 10022
(212) 909-6000
cmicarelli@debevoise.com

March 24, 2010

RECORD PRESS, INC., 229 West 36th Street, N.Y. 10018—26625—(212) 619-4949
www.recordpress.com